

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SYNTRIX BIOSYSTEMS, INC.,)	No. 3:10-cv-05870-BHS
)	
Plaintiff,)	ILLUMINA, INC.'S RESPONSE TO
)	SYNTRIX'S MOTION TO SEAL
vs.)	
)	
ILLUMINA, INC.,)	Note on Motion Calendar: Dec. 28, 2012
)	
Defendant.)	

Pursuant to Local Rules W.D. Wash. LCR 5(g)(3), Defendant Illumina, Inc. ("Illumina") responds to Syntrix Biosystems, Inc. ("Syntrix")'s Motion to Seal (Doc. No. 105) and requests that the Court order that the unredacted version of Exhibit E to Syntrix's Motion for Partial Summary Judgment remain sealed.

I. BACKGROUND

As support for its motion for partial summary judgment, Syntrix attached as Exhibit E excerpts of the Expert Report of Dr. Michael Metzker.¹ This document was designated as Confidential - Outside Counsels' Eyes Only under the Protective Order (Doc No. 49). Pursuant to LCR 5(g)(3), Syntrix publicly filed a version of Exhibit E (Doc. No. 107) containing

¹ Exhibit E was attached to the Declaration of Christopher Schenck in Support of Plaintiff Syntrix Biosystems, Inc.'s Motion for Summary Judgment (Doc No. 107).

ILLUMINA, INC.'S RESPONSE TO
SYNTRIX'S MOTION TO SEAL -- 1

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redactions to portions of five paragraphs that Illumina identified as confidential and proprietary. Syntrix also filed an unredacted version of Exhibit E (Doc No. 108) and a Motion to Seal (Doc. No. 105) that unredacted version. This Response supports Syntrix's Motion to Seal and requests that the unredacted version of Exhibit E remain sealed.

II. FACTS & AUTHORITY

Pursuant to the Protective Order issued by the Court on June 20, 2011 (Doc. No. 49 at 10-11), Illumina is permitted to file materials designated by either party as Confidential - Outside Counsels' Eyes Only, with such documents to remain under seal upon Court approval.

The Federal Rules of Civil Procedure recognize that courts may permit parties to file "trade secrets or other confidential research, development, or commercial information" under seal. Fed. R. Civ. P. 26(c)(1)(G) and (H). District courts "are in the best position to weigh the fairly competing needs and interests of the parties affected by discovery," in crafting the appropriate treatment of documents for which protected treatment is requested. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984); *see also Phillips v. General Motors Corp.*, 307 F.3d 1206, 1211-12 (9th Cir. 2002).

Further, while the public generally enjoys a right to inspect and copy public records, "it is uncontested . . . that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978).

A party seeking to seal judicial records can overcome the presumption of public access to court records by providing "sufficiently compelling reasons" that override the public policies favoring disclosure. *In re Midland Nat'l. Life Ins. Co.*, 686 F.3d 1115, 1119 (9th Cir. 2012). Compelling reasons "sufficient to outweigh the public's interest in disclosure and justify sealing court records exist when such 'court files might have become a vehicle for improper purposes,' such as the use of records to gratify private spite, promote public scandal, circulate libelous

statements, or release trade secrets.” *Id.* at 1120 (quoting *Nixon*, 435 U.S. at 598). The Ninth Circuit has adopted the Restatement of Torts’ definition of a trade secret, which states that a “trade secret is a process or device for continuous use in the operation of the business” and “may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.” *Clark v. Bunker*, 453 F.2d 1006, 1008-09 (9th Cir. 1972).

As shown in the supporting Declaration of Illumina’s in-house counsel, Amy McCourt (“McCourt Decl.”), there are “compelling reasons” to seal the documents described below that outweigh any public interest in disclosing them. These descriptions pertain only to the material that has been redacted from five paragraphs of Exhibit E. The remainder of Exhibit E is available publicly.

(1) Paragraphs 132-33, 138: These paragraphs contain an examination and a disclosure of confidential and non-public technical product specifications of Illumina’s products, details regarding Illumina’s product line and its scope. None of this information is shared publicly. (McCourt Decl. ¶ 3.) For instance, the number of formats that are available for all BeadChips and for a particular bead size is confidential and proprietary. Similarly, the catalog, “slide part” and “slide” numbers described in these paragraphs and the corresponding footnotes are used internally by Illumina and are not provided to customers or to competitors. (*Id.*)

(2) Paragraph 140: This paragraph contains the identity of a non-party licensor and a description of proprietary information that it licenses to Illumina. The non-party’s identity, the existence of the agreement, and the proprietary technology it licenses to Illumina are treated as confidential by both Illumina and the non-party and are the subject of the confidentiality provision of the license agreement. (McCourt Decl. ¶ 4.) Licensing agreements and related documents have been recognized as trade secrets, and thus courts have found there are “compelling reasons” to seal them. *See, e.g., In re Electronic Arts, Inc.*, 298 F. App’x 568, 569-70 (9th Cir. 2008) (sealing license agreement as trade secret); *Powertech Tech., Inc. v. Tessera*,

1 *Inc.*, No. C 11-6121, 2012 WL 3283420, at *9 (N.D. Cal. Aug. 10, 2012) (sealing licensing
2 information).

3 (3) Paragraph 277: This paragraph contains a disclosure of the deposition testimony of
4 Robert Kain, which was designated “Confidential Outside Attorneys’ Eyes Only.” Throughout
5 his testimony, including in the excerpts cited in paragraph 277, Mr. Kain disclosed highly
6 confidential information about Illumina’s past internal business practices, the development of its
7 intellectual property, and analysis and description of Illumina’s business strategies. (McCourt
8 Decl. ¶ 5.) Disclosure of this information to third parties and other party employees not covered
9 by the protective order would have the potential to lead to competitive harm. (*Id.*)

10 **III. CERTIFICATION AND CONCLUSION**

11 In compliance with LCR 5(g) and the procedures outlined in the Protective Order, counsel
12 for Illumina, including Eric Fraser and Diane Meyers, conferred with counsel for Syntrix,
13 including Michael Samardzija, by email on December 14, 17, and 18, 2012. Through this
14 correspondence, the parties addressed the need to file materials under seal and resulted in
15 decreasing the amount of material that needed to be filed under seal by agreeing to limit the
16 pages Syntrix would file and by agreeing to file a redacted version of Exhibit E. The redactions
17 described above, with respect to Illumina-designated information, reflect that conference of
18 counsel.

19 Illumina considers all of the information described in this motion and redacted from
20 Exhibit E to be confidential and proprietary. (McCourt Decl. ¶ 6.) It does not freely disclose this
21 information and provided it for use in this litigation pursuant to the protective order agreed to by
22 the parties and filed by the Court. (*Id.*) Illumina believes that the public disclosure of this
23 information would harm its competitive standing. Illumina redacted only a very small portion of
24 the material and Illumina is not aware of any public interest in the disclosure of this information.
25 For these reasons, Illumina requests that the Court enter an order that the unredacted version of
26 Exhibit E to Syntrix’s Motion for Partial Summary Judgment remain sealed.

ILLUMINA, INC.'S RESPONSE TO
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DATED this 21st day of December, 2012.

By: s/Diane M. Meyers

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2012, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants.

s/ Elizabeth G. Pitman

ILLUMINA, INC.'S RESPONSE TO
SYNTRIX'S MOTION TO SEAL -- 5

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